MGI SECURITIES SDN BHD

v.

TEONG TECK LENG & ORS

HIGH COURT MALAYA, KUALA LUMPUR
KL REKHRAJ J
[SUIT NO: D6-22-2760-1998]
25 NOVEMBER 1999

CIVIL PROCEDURE: *Res judicata - Trial - Arguments advanced by plaintiff to contradict decision of Senior Assistant Registrar - Appeal against said decision earlier withdrawn in favour of trial - Whether plaintiff estopped from advancing said arguments*

EVIDENCE: *Burden of proof - Onus - Plaintiff's submission that defence amounted to admissions - Court's finding that defence did not amount to admissions - Whether onus upon plaintiff to prove case - Evidence Act 1950, ss. 101, 102 - Whether there was evidence before court to adjudicate upon in view of plaintiff having elected not to lead evidence against defence - Whether case dismissed*

The plaintiff, a licensed stockbroker, claimed for the sum of RM63,603,522.09 in relation to shares it had purchased upon the oral instructions of the 2nd and 3rd defendants on behalf of the 1st defendant. The Senior Assistant Registrar ('SAR') dismissed the plaintiff's claim for the said sum after ruling that the defence was not a bare or general defence but a specific defence. The plaintiff appealed to the judge in chambers against the decision of the SAR and this was later withdrawn upon the consent of the plaintiff in favour of an early trial date. On the day of the trial, the plaintiff withdrew the proceedings against the 1st defendant on the basis that the 1st defendant had been adjudicated a bankrupt. The plaintiff also elected not to lead any evidence against the other two defendants. Instead, it was submitted that the defendants' defence amounted to admissions on the part of the defendants.

Held:

[1] As the plaintiff had withdrawn its appeal on a finding of the SAR, the plaintiff was estopped from adducing or advancing the same argument to contradict that decision which had become *res judicata* as that point of defence had been adjudicated by the court.

[2] Upon reading the pleadings, there were no clear and/or unequivocal admissions of any fact by the defendants. On the contrary, the plaintiff was demanded to proof of that claim and in the face of that finding, the plaintiff was not entitled to ask this court to read the meanings into

those pleadings "as admissions". Further, upon a fair construction of the defence as a whole, it did not appear to be so as such to fix the defendants with an admission.

[2a] Based on the finding that the defence was without admissions, the onus of proof was on the plaintiff to prove its case. Sections 101 and 102 of the Evidence Act 1950 requires "whosoever desire any court to give judgment as to any legal right or liability dependant on the existence of facts, which he exerts, must prove those facts exists". As the plaintiff elected not to lead evidence against the 2nd and 3rd defendants, there was no evidence of the plaintiff before the court to adjudicate upon.

[Claim dismissed.]

Case(s) referred to:
Hutchinson & Co [1936] 1 Ch 503 ***(refd)***

Legislation referred to:
Evidence Act 1950, ss. 101, 102
Rules of the High Court 1980, O. 18 r. 19(1)(a)

For the plaintiff - Chan Kok Keong (Norazali Nordin & Raja Saidatul Akhma Raja Lope with him); M/s Chan & Assocs
For the defendants - Mohamed Haniff Khatri Abdulla (Paramjit Singh with him); M/s Haniff & Rajendran

Reported by Usha Thiagarajah

JUDGMENT

KL Rekhraj J:

The plaintiffs are licensed stockbrokers. They claim that on or about 9 July 1996; the plaintiffs through their two representatives, namely Encik Khair Mahfar and Encik Sundararajah Ramasamy, had orally agreed with the second-named defendant, who purportedly is alleged to have acted upon and on behalf of the first-named defendant – *inter alia* that:

(i) the plaintiffs are to act as the first defendants stockbrokers;

(ii) that all the first defendants instructions would be given through the second and third-named defendants;

(iii) that the purchase/sale transactions are to be carried out in the name of either (a) Ng Sing Eng or (b) Transtasman Ltd. (a company registered in Virgin Island) as mere nominees of the first-named defendant.

That two plaintiffs representatives had acted upon the said **oral instructions** and purchased shares in the names of the said nominees to the value of RM63,603,522.09 sen; as particularised in the schedule annexed to the claim (running for a period 16 October 1996 to 1 May 1998.)

The plaintiffs claimed against the first-named defendant the said sum of RM63,603,522.09; and **in the alternatively**, against the second and third defendants by virtue of their oral representations and conduct for their having given oral instructions and by their such act warranted that they had the authority to act, and give such instructions on behalf of the first-named defendant; and that as a result thereof, the plaintiffs had now suffered loss and damages; and wherefore claimed against the **first defendant**:

(i) the outstanding loss of RM63,603,522.09 sen;

(ii) interest of RM9,292,618.79 sen worked up as at 30 April 1998;

(iii) interest at the rate of 20 per cent on RM63,603,522.09 sen with effect from 1 May 1998 to full realisation;

and in the **alternatively** against the second and third-named defendants:

(i) damages for breach of warranty of authority;

(ii) interest on the damages calculated by reference to what the first defendant would have been liable to the plaintiffs and etc.

The defendants in their defence dated 25 September 1999, categorically and specifically denied each of the paragraphs of the statement of claim; and by para. 18 thereof reserved that the defendants strenuously deny the whole of the plaintiffs claim of any oral representations as alleged to be made in the statement of claim; and prayed that the plaintiffs claim be dismissed with costs.

The plaintiffs at the close of pleadings, by encl. (7) filed a summons in chambers dated 4 November 1998, asking of the court –

(i) that the defendants defence be struck off pursuant to O. 18 r. 19(1)(a) of the Rules of the High Court 1980 as the defence as filed discloses no reasonable defence; or

(ii) that the defendants defence be struck off pursuant to the inherent jurisdiction of the court; and

(iii) that with the striking off the defendants defence, the plaintiff be at liberty to enter judgment against the first-named defendant; or against the second and the third defendant as prayed for in the statement of claim.

The learned Senior Assistant Registrar made a ruling that the defence as filed was **not** a bare or general defence, but a specific defence; and accordingly dismissed the plaintiffs summons with costs.

The plaintiffs then appealed to the judge in chambers against the learned Senior Assistant Registrar's decision; and at the hearing of the appeal before the judge; it was by consent of the solicitors withdrawn with no order as to costs; in favour of an early trial date; which was fixed for two days 24 and 25 November 1999.

On the date of the trial, the plaintiffs solicitors withdrew the proceedings against the first-named defendant for reasons, that he has been adjudicated a bankrupt *vide* bankruptcy proceeding in D5-29-2020-99 on 15 October 1999; and **elected not to lead any evidence against the other two defendants**; instead shall submit that the defendant's defence lacked sufficient traverse in the plea, thereby amounting to admissions on the part of the defendants.

The court upon hearing the solicitors submissions, made a finding that as the appellants had withdrawn their appeal on a finding of the Senior Assistant Registrar to the effect that the defence was a specific defence without any clear admission on the part of the defendant; the plaintiffs are now **estopped** from adducing or advancing the same argument to contradict that decision which has now become *res judicata*; as that point of defence has been adjudicated by the court; and the parties by with-drawing the appeal on that point are now not permitted to re-litigate per His Lordship Dato' Peh Swee Chin FCJ [1995] 3 AMR p. 2574.

Further, upon reading the pleadings as filed more particularly the defence, I found that **there were no clear and or unequivocal admissions of any fact by the defendants**; contrary, the plaintiffs were demanded to proof of that claim; and in the face of that finding, the plaintiffs are now not entitled to ask this court, to read the meanings into those pleadings "as admissions", which upon a fair construction of the defence as a whole, do not appear to be so as such to fix the defendants with an admission – (Re Lord Justice Green in the case of *Hutchinson & Co* [1936] 1 Ch p. 503 –

> the plaintiff is not entitled to ask the court to read the meanings into his pleadings which upon a fair construction do not clearly appear so, in order to fix the defendants with admissions.

In the face of this finding that the defence was without admissions; the onus of proof is now shifted to the plaintiff to prove its case; as ss. 101 and 102 of the Evidence Act 1950, requires "whosoever desire any court to give judgment as to any legal right or liability dependant on the existence of facts, which he exerts, **must prove those facts do exist**;" and here the **plaintiff**

having chosen and elected not to lead the evidence of the oral agreements through its witnesses; the court could only hold that there was no evidence of the plaintiffs before the court to adjudicate upon; and accordingly dismissed the plaintiffs claim with costs.